FU YEN DEVELOPMENT SDN BHD

v.

SHELLEY YAP LEONG & CO

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RICHARD MALANJUM J
[SUIT NO: K22-149-1995]
26 MAY 2001

CIVIL PROCEDURE: *Action - Commencement - Action by plaintiff firm partnership - Whether plaintiff was a partnership at the time of commencement of action - Whether business carried on within jurisdiction - Rules of the High Court 1980, O. 77 r. 1*

CIVIL PROCEDURE: *Striking out - Striking out action commenced by plaintiff firm partnership - Whether plaintiff was a partnership at the time of commencement of action - Whether business carried on within jurisdiction - Rules of the High Court 1980, O. 77 r. 1, O. 18 r. 19*

The appellant commenced an action ('the action') for negligence and/or breach of duty against the respondent legal firm as a result of the striking out of its three earlier suits wherein the respondent acted on its behalf as advocates and solicitors. The deputy registrar struck out the action upon the application of the respondent. Hence, the present appeal.

The respondent claimed that the action of the appellant should be dismissed under O. 18 r. 19 Rules of the High Court 1980 ('RHC') as the trading license that was issued to the appellant in 1995 showed that it was not a partnership at the time of the commencement of the action in 1995 but a sole proprietorship. Therefore, there was an abuse of O. 77 r. 1 RHC. Whilst the appellant claimed that the respondent should not have applied under O. 18 r. 19 RHC since no conditional appearance was entered.

Held:

[1] The trading license did not show the existence of a partnership when the action was commenced. The affidavits that were filed were nothing more than assertions of the deponents and not evidence of partnership. There should at least be some evidence of partnership in the form of accounts, bank statements or income tax returns. The trading licence indicated nothing more than that it was a new licence. Steps could have been taken to rectify the error in the 1995 trading licence if indeed there was a partnership. Therefore, the first limb of O. 77 r. 1 RHC was not satisfied.

[2] In respect of the second limb of O. 77 r. 1 RHC, it was also admitted in the series of affidavits filed that the appellant was no longer in business at the time of the commencement of the action. Further, it was not denied that the owner of the appellant was then employed in Singapore at the commencement of the action.

[3] The action as it stood was an abuse of O. 77 r. 1 RHC. It was therefore a plain and obvious case that it could not proceed in the manner it was commenced.

[4] Conditional appearance should only be entered if the objections were in relation to a defective writ, regularity of service of the writ, or jurisdiction of the court. The main objection in this case did not fall within any of those categories.

[Appeal dismissed.]

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd [1995] 1 CLJ 461 ***(refd)***

Lee Nyan Choi v. Voon Noon [1979] 2 MLJ 28 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19, O. 77 rr. 1, 2

For the appellant - Alice Imelda Chin

For the respondent - Roderick A Fernandez; M/s Shelley Yap Leong Tseu Chong Chia & Co

Reported by Usha Thiagarajah

JUDGMENT

Richard Malanjum J:

On 6 April 2001 I dismissed with costs the appeal of the appellant against the decision of the Deputy Registrar (DR) to strike out the action of the appellant on the application of the respondent. The respondent was also allowed to enter judgment for costs including the costs of the application. In so doing I said that I would give the reasons in the event of further appeal. As there is a notice of appeal filed I now give my reasons.

By a writ of summons and statement of claim dated 24 November 1995 the appellant commenced an action against the respondent, a legal firm in Kota Kinabalu, Sabah in connection with its three earlier suits, namely Suit No. 588 of 1979, Suit No. 1010 of 1979 and Suit No. 1565 of 1979. The appellant claimed that because of the negligence and/or breach of duty of the respondent

while retained as advocates and solicitors these three suits were struck out. Particulars of negligence and/or breach of duty were given. And the appellant prayed for relief, *inter alia*, (i) damages in the total sum of RM3,435,511.38; (ii) statutory interest on the judgment sum at the rate of 8% per annum from the date of judgment to the date of full payment; (iii) costs; and (iv) such further and other relief as the court may deem fit to grant.

The gist of the respondent application (encl. 6) under O. 18 r. 19 of the Rules of the High Court 1980 (the Rules) was that the action should be dismissed and that the respondent be at liberty to enter judgment for costs including the costs of the application since the appellant was not a partnership at the time of commencement of the action in 1995 but a sole-proprietorship. Hence it was contended that there was an abuse of O. 77 r. 1 of the Rules. The foundation of the assertion was on the trading licence issued in 1995 with only one name appearing therein. According to learned counsel for the respondent prior to the 1995 trading licence the previous one was in 1979. However there was nothing to indicate that the 1995 licence was a renewal of the 1979. In fact it was pointed out that the 1995 licence had the word 'new' written on it. Hence learned counsel said that one could not tell if the 1995 licence was a renewal. And the appellant could not show otherwise.

Another point that was raised by the respondent was that the owner of the Appellant was in fact a person by the name of Chung Mui Fatt who was then lecturing in Singapore and thus out of the jurisdiction of the court.

Indeed learned counsel for the respondent put his case in this way:

> Basically the whole thrust of our case is that in order for Plaintiff to take advantage of Order 77 Rule 1, two requirements to be adduced:
>
> (1) at the time of the suit the firm has 2 or more partners; and
>
> (2) at the time of the suit the firm must be carrying business within the jurisdiction.

For the appellant it was argued that existence of a partnership should not be judged purely on the trading licence since that would only be a *prima facie* evidence of such fact. Learned counsel said that the intention and other evidence such as the assertion of the deponents in the several affidavits filed opposing the application should also be taken as evidence of such partnership. And it was canvassed that the relevant Order in the Rules on partnership should be O. 77 r. 2 whereby the respondent should ask for the appellant to declare the names of parties in the partnership. It was also the contention of learned counsel for the appellant that O. 18 r. 19 was not appropriate since there was no entry of conditional appearance. The case of *Alor Janggus Soon Seng Trading Sdn. Bhd. & Ors v. Sey Hoe Sdn. Bhd.* [1995] 1 CLJ 461 was cited in support.

And it was also submitted that just because a business had shut its shutter did not mean that it could no longer operate. It should be entitled to carry on until all sums due and all debts have been collected and paid respectively.

In the course of the hearing I sought from learned counsel for the appellant to adduce any form of contemporaneous document, be it in the form of bank statement or such other activities of the partnership that could support such a fact. An adjournment was even granted for that purpose. Unfortunately there was none although a further affidavit was filed containing only assertions of the deponents.

It is trite law that the power to strike out a case without having to go for trial should be exercised sparingly and only in plain and obvious case. (see: *Lee Nyan Choi v. Voon Noon* [1979] 2 MLJ 28).

Now O. 77 r. 1 reads:

> Actions by and against firms within jurisdiction. (O. 77 r. 1)
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> Subject to the provisions of any written law, any two or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction may sue or be sued, in the name of the firm (if any) of which they were partners at the time when the cause of action accrued.

Having perused the trading licence exhibited as 'A' in encl. 6 I agreed with learned counsel for the respondent that the word 'New' was obviously written on it. And there was only one name as the proprietor. Nothing to indicate that it had any connection with the previous trading licence issued under the same name. Accordingly I was inclined to accept that on the trading licence alone it was obvious that there was no partnership in existence when the action was commenced.

No doubt the appellant could adduce other evidence to show existence of a partnership. But from the several affidavits filed they contained nothing more than assertions of the deponents. Surely there should be at least some evidence of partnership in the form of accounts, bank statements or income tax returns if indeed there was one. Even if it was not in operation at the material time there should have been records to show that there was a continuation of the partnership since 1979 onwards. I was aware of the explanation given for the absence of such documents. But I do not think it would make any difference if the same assertions were to be repeated by the same deponents in a full trial. In this case the trading licence indicated nothing more than that it was a new licence. Steps could have been taken to rectify the error in the 1995 trading licence if indeed there was partnership even at the material time. That is the first limb of O. 77 r. 1 of the Rules.

In respect of the second limb it was also admitted in the series of the affidavits filed that the appellant was no longer in business at the time of commencement of the action. And it was not denied that Chung Mui Fatt was then employed in Singapore at the commencement of the action.

As such I agreed with the learned counsel for the respondent that the action as it stood was an abuse of O. 77 r. 1 of the Rules. It was therefore a plain and obvious case that it could not proceed in the manner it was commenced.

As for the contention that the respondent should not have applied under O. 18 r. 19 of the Rules since there was no conditional appearance entered, with respect I think the reply of learned counsel for the respondent answered it in that conditional appearance should only be entered if the objections were within any of the following, namely:

(i) the defective writ;

(ii) regularity of service of the writ; or

(iii) jurisdiction of the court.

The main objection in this case did not fall within any of those categories.

For the above reasons that I dismissed the action and affirmed the decision of the learned Deputy Registrar.